UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff, Civil Action No.:

-against-

NEW YORK STATE SUPREME COURT,
ERIE COUNTY,

LINDA ANGELLO, Commissioner
of Labor of the State of New York,

ADAM W. PERRY, Receiver of St. Augustine
Center, Inc,

Defendants.

COMPLAINT

The United States of America, pursuant to the provisions of 26 U.S.C. §§ 7401 and 7403, with the authorization of a delegate of the Secretary of the Treasury and at the direction of the Attorney General of the United States, brings this complaint to foreclose the federal tax liens securing the federal employment tax and federal income tax liabilities of St. Augustine Center, Inc. ("the Center"), against certain funds held by Adam W. Perry, the receiver for the Center, and to enjoin the New York State Supreme Court, Erie County, from proceeding further in the receivership action in the meantime. For its complaint, the United States alleges as follows:

Jurisdiction and Parties

1. The Court has jurisdiction over this matter under 28 U.S.C. §§ 1331, 1340, and 1345, and 26 U.S.C. §§ 7402(a) and 7403.

2. The New York Supreme Court, Erie County ("the State Court") is named because the State Court has denied a motion by the United States to intervene and may issue an order approving the receiver's report, awarding fees and costs to the receiver for the Center, and distributing funds to claimants in the receivership action from those certain funds held by the receiver for the Center as described in paragraph 11, below, that constitute a portion of the Center's assets against which the United States seeks to foreclose its tax liens.

3. Linda Angello is the Commissioner of Labor of the State of New York, and is named because she is the petitioner in the State Court receivership action. The Commissioner may have an interest in the property upon which the United States seeks to foreclose its liens, as she purports to represent the interests of former employees of the Center who have claims for wages.

4. Adam W. Perry is the receiver for the Center, appointed by the Honorable John A. Michalek, Justice of the Supreme Court of New York, Erie County, with his principal place of business at Hodgson Russ, LLP, One M&T Plaza, Suite 2000, Buffalo, New York 14203, and is named in this matter because he is in possession of those certain funds that he holds as receiver of the Center as described in paragraph 11, below, that constitute a part of the Center's assets against which the United States seeks to foreclose its tax liens, and also because he claims he is entitled to compensation for himself and his counsel from said funds.

The Center's Federal Tax Liens

5. The Center failed to fully pay its federal employment taxes, and the Internal Revenue Service ("IRS") made assessments and filed notices of federal tax liens as follows:

Type of Tax	Tax Period	Date of Assessment	Total amount Due and Owing, Including Penalties and Interest Accrued	Date Notice of Federal Tax Lien Filed
941	9/30/2003	12/29/2003	$ 12,344.79	6/6/2005
941	12/31/2003	4/5/2004	$ 112,032.46	6/6/2005
941	3/31/2004	6/7/2004	$ 93,370.82	6/6/2005
941	6/30/2004	10/11/2004	$120,427.59	6/6/2005
941	9/30/2004	2/28/2005	$ 117,724.08	6/6/2005
941	12/31/2004	4/4/2005	$ 136,425.80	6/6/2005
941	3/31/2005	8/15/2005	$ 107,227.58	12/19/2005
			$699,553.12	

6. A delegate of the Secretary of the Treasury of the United States of America gave notice of the assessments to and made demand for payment of the assessments.

7. Despite said notices and demand for payment, the Center has failed, refused, or neglected to pay the amount of the assessments in full.

8. On the date of each of the assessments set forth above, a federal tax lien arose and attached to all property and rights to property belonging to the Center.

9. After the application of all abatements, payments, and credits, and the inclusion of all interest and penalties, the Center remains indebted to the United States for the unpaid federal tax liabilities in the amount of $699,553.12, plus such additional amounts, including interest, which accrued and continue to accrue as provided by law from the date of those assessments.

10. Notices of the Federal Tax Lien were filed with the Secretary of State's Office in Albany, New York, and the Erie County Clerk's Office.

11. Upon information and belief, the Receiver appointed by the State Court, is holding a stake consisting of liquid assets of the Center in the amount of $178,262.82.

12. The United States' federal tax liens attach to the stake held by the Receiver and should be foreclosed upon the funds described in paragraph 11, as well as upon any additional property held by the Receiver or owned by the Center.

13. The assets described in paragraphs 11 and 12 should be distributed to the United States and other creditors according to the priorities determined by this court.

Procedural History of Receivership Action

14. On October 18, 2005, a petition was filed in the Erie County Supreme Court, captioned Linda Angello, Commissioner of Labor of the State of New York v. St. Augustine Center, Index No. 2005-9824, because the Center was not paying wages to its employees in violation of Labor Law §§ 218 and 219. On February 17, 2006, in Index No. 2006-1137, the Honorable John A. Michalek, Justice of the Supreme Court, issued an order appointing Adam W. Perry as Temporary Receiver of the Center.

15. Prior to Mr. Perry's appointment, the IRS, filed notices of federal tax liens for the tax assessments described in paragraph 5, above. Pursuant to 26 U.S.C. § 6321, the tax liens attach to all property and rights to property of the taxpayer, including personal as well as real property.

16. On April 13, 2006, the IRS filed a Proof of Claim for Internal Revenue Taxes, including those liabilities set forth in paragraph 5, in the State Court receivership action.

17. While serving as the temporary receiver, Mr. Perry found a care provider to acquire the Center's entire caseload and ongoing business and received $125,000 from All Metro Health Care, which also agreed to employ the Center's employees working on active cases, but which terminated all other employees. Mr. Perry also billed and collected $28,092.90 in accounts receivable, received $11,281.25 from the proceeds of an auction of the Center's furniture and office equipment, and accounted for other miscellaneous assets of the Center. Mr. Perry reports that he holds $178,262.82 in liquid assets that are available for distribution to the Center's creditors, before deducting any payments for compensation to Mr. Perry and his counsel. In addition, the Center owns approximately fifteen parcels of real property in Buffalo, New York.

18. On December 19, 2006, the United States filed a Notice of Removal in this matter in the United States District Court for the Western District of New York.[1] The United States also filed a Notice of Removal in the Erie County Clerk's Officer at approximately 9:00 a.m. on December 20, 2006. The United States took the position that the receiver's motion that included a proposed distribution plan for the funds held by the receiver, sought relief "against the United States" under 28 U.S.C. § 1442 because it was served on the IRS and requested the State Court order distribution in derogation of the tax liens. Justice Michalek convened the hearing on Mr. Perry's motion on December 20, 2006, but continued the hearing until December 21, 2006, at which time he determined that he had no jurisdiction to hear the motion since the matter had been removed to federal court.

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[1] The Notice of Removal also contained an Advance Objection to Any Motion to Remand Unless This Court Determines That the United States is Not a Party and Will Not be Bound.

19. On December 22, 2006, the Honorable John T. Elfvin, United States District Court Judge, convened a hearing at Mr. Perry's request who contended that the action was improperly removed. At that hearing, Mr. Perry took the position that the United States was not a party to the instant matter, so that it was not susceptible of removal. On December 27, 2006, Judge Elfin issued a Memorandum and Order observing that the United States had not intervened in the instant matter and that "there has been no State Court order or process *against* the United States." (*Angello v. St. Augustine Ctr., Inc.*, No. 06-CV-0838E(Sc), slip op. at 5 (W.D.N.Y. Dec. 27, 2006)). Judge Elfvin concluded that the removal was improper, and remanded the matter back to the State Court. In addition, the court denied the Conditional Petition/Motion for Emergency Injunctive Relief against the receiver, based on a lack of jurisdiction in the removed receivership action, and noted that "the IRS can petition the State Court for such relief if it seeks to intervene in the receivership action." (Id.).

20. On December 29, 2006, the United States filed a Motion to Intervene in the State Court receivership action to enforce the federal tax liens, pursuant to 26 U.S.C. § 7424. Justice Michalek held a hearing on the motion on January 10, 2007, and after hearing arguments, ruled from the bench that the United States' Motion to Intervene was denied. Justice Michalek, nevertheless, suggested that the United State could, as a claimant, file an objection to the claim of the receiver for fees.

Count I - Foreclosure

21. The United States asserts that the State Court lacks authority to divest the federal tax liens from the funds, since it denied the motion to intervene. 26 U.S.C. § 7424.

22. The United States maintains that its federal tax liens have priority of all other claims except those accorded priority by 26 U.S.C. § 6323.[2]

WHEREFORE the United States requests that the State Court be enjoined, during the pendency of this action, from further adjudicating the claims and interests of other persons in the funds or other property held by the Receiver, and requests such other or further relief as this Court deems appropriate.

Count II – Injunctive Relief

23. The statutory authorization for the United States to commence an action to foreclose a federal tax lien in a federal district court in 26 U.S.C. § 7403, coupled with the special removal provision in 26 U.S.C. § 7424, reflects that Congress accorded the United States an unconditional statutory right to have the validity and/or priority of any federal tax liens vis-a-vis any other claims or interests determined in the federal court system, even when there is a prior proceeding already pending in a state court.

24. Although § 7424 provides that the denial of a motion to intervene by a state court shall mean that any state court disposition of property has no effect on the federal tax lien, nevertheless, where the property is money that will be distributed pursuant to a court order, the practical effect of the distribution may be to impair the ability of the United States to enforce its liens, or to make said enforcement more difficult and costly to the United States.

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[2]The United States maintains that this priority extends to the claims of the receiver and his counsel for compensation except to the extent that the receiver's counsel may establish an attorney's lien within the purview of 26 U.S.C. § 6323(b)(8). Notwithstanding the foregoing, the United States has advised the receiver that it would agree to carve out of its tax lien such portions of the receiver's attorney's fees as were incurred in the sale of the business and its assets and the collection of its accounts receivable, regardless of whether the receiver's counsel can bring those claims within the purview of 26 U.S.C. § 6323(b)(8).

25. The United States maintains that if the State Court is permitted to continue its adjudication of the receiver's motion for distribution of the funds, the United States may be irreparably harmed in various ways, as more particularly described in the motion for a preliminary injunction being filed immediately after the filing of this complaint.

WHEREFORE the United States requests the entry of an order foreclosing the tax liens against the funds currently held by the receiver of the Center, as well as upon any additional property held by the receiver or owned by the Center, except to the extent that any claim asserted by another party is determined to be superior to the tax liens of the United States, and requests such other or further relief as this court deems appropriate.

Respectfully submitted,

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